

BLAND, C., 6th September, 1830.—After a case has been set for hearing, or stands so according to the course of the Court, no new commission to take testimony, or further time for that purpose can be allowed to either party, but by a special order. To obtain such an order the party must by a petition, on oath, state the name of the witness, without whose testimony he cannot safely proceed to hearing; the points to which he can materially depose; and the reason why he has not been previously examined, if it should not sufficiently appear from the nature and circumstances of the case. 1 *Vern.* 334; *Jessup v. Duport*, *Barnar.* 193; *Oldham v. Carleton*, 4 *Bro. C. C.* 88; *Rougemont v. The Royal Exchange Assurance Company*, 7 *Ves.* 304; *Mendizabel v. Machado*, 1 *Cond. Cha. Rep.* 553. Here, however, the plaintiff has laid a sufficient foundation for granting the prayer of his petition.

168 * Ordered, that a commission issue as prayed; that the testimony taken under the same be subject to all legal exceptions, and be returned on or before the fourth day of the next term; at which term this case is to stand for hearing. But nothing herein shall be so construed as to preclude the defendants from asking a continuance of the case if deemed necessary to take further testimony on their part.

Under this order a commission was issued and testimony taken and returned accordingly.

BLAND, C., 30th December, 1830.—This case standing ready for hearing, and the solicitors of the parties having been fully heard the proceedings were read and considered.

The proofs substantially sustain the allegations of the bill, and leaving none of the facts of doubtful credibility, there is nothing to be determined but the principles of equity properly arising out of those established facts.

The defendants contend that the mortgage is void upon its face, to the extent of the personalty at least, as having been made by one who is incompetent so to dispose of it; and also, that it is a nullity as against one of the grantors who was an infant when he signed it; and against all of them; because it has not the requisite solemnity of such a contract, that of having been recorded in time; and further, that there is an implied contract, attendant upon this mortgage, which imposes obligations upon Salmon, in favor of the sureties of Thomas Clagett, which Salmon has, in various ways, so disregarded as to have released those sureties from the incumbrance of the mortgage.

In answer to which it is denied, that any act of Salmon's as here shewn, can be considered as having that operation; and moreover it is urged, that all the obligations of the implied contract have been carefully and effectually preserved for the benefit of those sure-